No. 93-5770

In the

Supreme Court of the United States

October Term, 1993

ROBERT EDWARD STANSBURY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

PETITIONER'S REPLY BRIEF

ROBERT M. WESTBERG*
(Appointed by This Court)
DAVID S. WINTON
JOSEPH A. HEARST
PILLSBURY MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104
(415) 983-1000

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

INTRODUCTION

Respondent State of California acknowledges that the standard for determining custody for *Miranda* purposes is an objective one, and implicitly concedes that the state courts erred in determining that petitioner was "in custody" only when he became the "focus" of the investigation in the mind of the interrogating officer. Respondent's Brief ("Resp. Br.") at 21-22, 29; *see* J.A. 432-33, 477. Respondent, however, would now rewrite the question on which certiorari has been granted as if it involves only a challenge to the sufficiency of the evidence to support the trial court's findings. *See* Resp. Br., "Question Presented." Respondent not only ignores the lack of any relevant factual findings by the trial court (*see* J.A. 432-33), but also mischaracterizes the record in numerous respects.[1]

A more fundamental flaw in respondent's analysis is that it would have this Court examine in isolation, or serially, each of the elements bearing on the issue of "custody," while ignoring the cumulative effect of those elements on a reasonable person in petitioner's situation at the time of the interrogation. For example, respondent argues that, since petitioner allegedly "agreed" to go to "the police station" for questioning, the circumstances surrounding his initial encounter with the police and his

---

[1] A glaring example of respondent's distortion of the record is the repeated assertion that petitioner's interrogation took place "at the police station" or "station house" (e.g., Resp. Br. at 11, 14, 16, 28, 33), and in the "proximity of" or "near" the jail (*id.* at 11, 14, 34). In fact, petitioner was questioned *in* the jail. J.A. 73, 260, 401-03. Numerous other mischaracterizations of the record are noted below.

transportation to the jail "play no part" in determining whether the interrogation was custodial. Resp. Br. at 28. The argument completely overlooks that it is the sum total of the events, as perceived by a reasonable person in petitioner's position at the time of his interrogation, that determines the issue of custody:

> The question of whether someone believes that he is free to leave requires the court to examine the interaction between the citizen and the police officer *as it evolves*. Additional restraints, directions, questions or commands can at any time during an interrogation change a suspect's perception of whether he is free to go.

U.S. v. Camacho, 674 F.Supp. 118, 122 (S.D.N.Y. 1987) (emphasis added), *aff'd*, 868 F.2d 1268 (2d Cir. 1988), *cert. denied*, 493 U.S. 1034 (1990); *see also California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*) (whether defendant is in custody for *Miranda* purposes is to be determined by the "totality of the circumstances").

However one might view in the abstract each separate step or element in the events that preceded petitioner's interrogation, as respondent urges (Resp. Br. at 28), a reasonable person in petitioner's position at the time of the interrogation would necessarily be subject to the cumulative effect of all the elements: the late hour of the night, the confrontation at the trailer by four officers with guns out of their holsters and "in a ready position" (J.A. 209), the "request" to accompany the officers to the police station, the transportation in one police car with a second car following, being escorted into the jail itself, and the absence of anyone but police at the interrogation. It is untenable to suggest that a reasonable person in

petitioner's position, finding himself isolated in "a locked interrogation room in the secure area of the jail" (J.A. 473) and unable to leave without the assistance of his interrogators, would disregard the build-up of events which brought him there in evaluating whether he was free to avoid questioning.

Looking at the undisputed facts solely from the perspective of a reasonable man in petitioner's position – as respondent admits the courts below failed to do – it is obvious that respondent failed to meet its burden of proving that petitioner was not " 'in custody' for practical purposes" (*Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)) during his interrogation.[2]

ARGUMENT

I. PETITIONER'S "AGREEMENT" TO ACCOMPANY THE POLICE FOR QUESTIONING WAS NOT VOLUNTARY IN VIEW OF THE POLICE SHOW OF FORCE AT THE TIME OF THE ENCOUNTER.

Respondent erroneously asserts that petitioner's confrontation with the police at 11 p.m., and his transportation

---

[2] Respondent says that this Court may and should decide whether petitioner was in custody. Resp. Br. at 29. Petitioner agrees. We reiterate, however, that California has allocated to respondent the burden of proving that petitioner was *not* in custody at the time of his interrogation. *People v. Sam*, 71 Cal.2d 194, 201-02, 454 P.2d 700, 703-04, 77 Cal.Rptr. 804, 807-08 (1969). Accordingly, to the extent that respondent contends that there are inadequacies in the record on certain points, respondent is not entitled (as its brief seems to assume) to have those points determined in respondent's favor.

to the jail for questioning, were "consensual encounter[s]." Resp. Br. at 30, 33. The claim finds no support in the record.

The argument that petitioner "consented" to an interview rests primarily on the assertion that the police officers employed "conditional language." Resp. Br. at 31. However, respondent's discussion of the "conditional" language and petitioner's alleged responses (Resp. Br. at 30) implies incorrectly that the officers purported to testify to the words used. They did not. Rather, the officers largely testified to the substance of the conversations. The record does not purport to contain the actual words spoken on this point by either the police or petitioner. *See* J.A. 36-37, 56-58.[3]

More importantly, respondent would ignore the timing and other circumstances of petitioner's encounter with the police. A "request" by four officers fanned out around the door to the trailer where petitioner was staying, with guns in their hands, at night, bears no resemblance to the manner in which the defendants were invited to the police station in prior cases in which this Court has found station house questioning to be noncustodial.[4] There is also no resemblance between this case

---

[3] Officer Lee testified at one point that he "told" petitioner "if he would accompany me to the Pomona Police Department." J.A. 36. At another point he said that he "asked him if he would accompany me to the Pomona Police Department, and if he didn't have transportation, I would provide it for him." J.A. 56. The actual words spoken are not set forth.

[4] In *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*), the defendant "came voluntarily to the police station" after he had contacted the police by telephone in response to a note left by an officer at his residence, and was "immediately informed that he was not under arrest." Similarly, in *California v. Beheler*, 463 U.S. at 1122, the defendant himself initiated the first contact with the police, and he was "specifically told . . . that he was not under arrest" before he was questioned.

Petitioner was never offered the opportunity to be questioned at the trailer where he was staying or to contact the police on his own later to arrange an interview.

and what *Miranda* referred to as " '[g]eneral on-the-scene questioning'," contrary to respondent's suggestion. Resp. Br. at 31 (quoting *Miranda v. Arizona*, 384 U.S. 436, 477 (1966)).

Respondent attempts to justify the urgency that is implicit in sending four officers to pick up petitioner late at night by pointing out that "time is critical in a homicide investigation." Resp. Br. at 30 n.14. This misses the point. Petitioner assumes that the police felt it was urgent that Sergeant Johnston question petitioner when he did. Indeed, that urgency manifested itself in the number of officers sent to pick up petitioner, in the lateness of the hour, and in the fact that the officers drew their guns. Given the indications of urgency, the fact that petitioner appeared to the officers to be "very cooperative" and "agreed" to accompany them (Resp. Br. at 10, 32) does not establish that the encounter was "consensual" (*ibid.*), as respondent argues, but only that petitioner chose not to resist:

> Consent that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse.

Florida v. Bostick, ___ U.S. ___, 111 S.Ct. 2382, 2388 (1991); *see also People v. Boyer*, 48 Cal.3d 247, 263-64, 272, 768 P.2d 610, 617, 623, 256 Cal.Rptr. 96, 103, 109 (1989), *cert. denied*, 493 U.S. 975 (1989) (defendant in custody even though he "agreed" to go to the police station, he was not handcuffed and the police car doors were not locked).

Respondent also asserts that "the location of [officer] Lee's gun prevented petitioner's view of the weapon," implying that petitioner was unaware of the guns in the officers' hands. Resp. Br. at 10 n.9; *see also id.* at 30-31. Officer Lee, however, testified only that *he* attempted to hold his gun behind his leg so that petitioner might not see it. J.A. 63, 65. None of the other officers claimed to have done likewise. *See* J.A. 55, 63-65, 207-08, 380-81. Moreover, all four officers holstered their weapons only *after* petitioner was outside the trailer. J.A. 57. The trial court made no finding that petitioner never saw the weapons.[5] Respondent's contention that "[t]he evidence adduced at the suppression hearing did not establish that petitioner saw the guns in the remaining police officers'

[5] Respondent's assertion that the officers who accompanied Lee were "at the end of the trailer" (and thus presumably out of petitioner's sight) (Resp. Br. at 10 n.9) is inconsistent with the record. Sergeant Higgenbotham, the leader of the group, testified that the officers had discussed their deployment and decided *not* to place themselves at the end of the trailer. J.A. 213. Instead, two officers went to the door while Higgenbotham and another officer stood about 10 feet away just off to the left, all facing the door of the trailer. J.A. 207, 380-82.

hands" (Resp. Br. at 30) fails to acknowledge respondent's burden of proof; there was no evidence that petitioner could *not* see the guns.[6]

Respondent also contends that, "[t]he police gave petitioner no reason to believe that the interview 'would be other than temporary,'" citing *Berkemer*. Resp. Br. at 38. But *Berkemer* involved questioning of a motorist incident to an ordinary traffic stop, which this Court said is "quite different from station house questioning, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." 468 U.S. at 438. Traffic stop questioning is presumptively temporary and brief and, more important, is public. *Berkemer* does not support a presumption that petitioner's interrogation in the jail would be brief.

[6] Relying on *Florida v. Bostick*, ___ U.S. ___, 111 S.Ct. 2382 (1991), respondent also argues that petitioner's initial encounter with the officers involved no "display of force" because the officers did not point their weapons at petitioner and holstered them when he came out of the trailer. Resp. Br. at 30-31 & n.15. In *Bostick*, this Court noted that the fact that an officer carried a zippered pouch containing a gun during a search of a bus passenger did not render the encounter nonconsensual, since the officer never removed the gun from its pouch. 111 S.Ct. at 2385.

Carrying a zippered holster containing a weapon is not remotely like holding a loaded weapon in the hand in a "ready position," as did the officers here. Moreover, the fact that "the officers holstered their weapons when petitioner exited the trailer" (Resp. Br. at 10 n.9) does not eliminate the compulsive pressures inherent in the initial display of force.

Respondent appears to concede that the police never advised petitioner that he was free to refuse to accompany them (*see* Resp. Br. at 25-26), but argues that the police had no obligation to do so. Contrary to the implication in respondent's brief, petitioner does not contend that the police are required to recite "a 'pre-*Miranda*' litany" to "every person with whom they have contact." *See* Resp. Br. at 26, 35-36 & n.19. Rather, petitioner submits that where, as in this case, a person whom the police wish to question could reasonably conclude that he is not "'at liberty to ignore the police presence and go about his business' " (*Florida v. Bostick*, ___ U.S. ___, 111 S.Ct. at 2387, quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)), the police can nonetheless easily dispel any inherent coercion by informing the subject that he is free to refuse the police request. Where the police do not do so, and also proceed to interrogate without a *Miranda* warning, the state should not be heard to argue that there was no custodial interrogation simply because the subject did not resist or question the police authority.[7] It is significant that in the very cases from this Court upon which respondent principally relies for its argument that petitioner was not in custody, the Court emphasized that the police had explicitly told the defendants that they were free to refuse the police requests, thus dispelling any impression of coercion.[8]

---

[7] Respondent's assertion that petitioner "never objected" (Resp. Br. at 33 & 34, n.18), appears to assume that a reasonable citizen who confronts four officers with their guns out will question their authority. This proposition is untenable.

[8] *Oregon v. Mathiason*, 429 U.S. at 495 (court determined that the defendant was not in custody for *Miranda* purposes in part because he had been "informed that he was not under arrest"); *California v. Beheler*, 463 U.S. at 1122, 1125 (suspect who was "specifically told" he was not under arrest was not in custody for *Miranda* purposes); *Florida v. Bostick*, ___ U.S. ___, 111 S.Ct. at 2385 (fact that police officers specifically advised defendant that he could refuse consent to search relevant to question whether consent was voluntary); *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) ("it is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search").

II. UNDER THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE, PETITIONER WAS SUBJECTED TO AN ILLEGAL SEIZURE.

Respondent suggests that whether petitioner was in custody when he was questioned can be answered, at least in part, by asking whether he was "seized" under this Court's Fourth Amendment holdings. Resp. Br. at 24. Although petitioner does not contend that every Fourth Amendment "seizure" triggers an obligation to give a *Miranda* warning, we submit that petitioner was subjected to a " 'restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. at 1125, quoting *Oregon v. Mathiason*, 429 U.S. at 495. Nothing in this Court's Fourth Amendment jurisprudence justifies questioning in the jail without a *Miranda* warning.

The circumstances under which petitioner was picked up and questioned are much more coercive than those in *Dunaway v. New York*, 442 U.S. 200, 212, 219 (1979), in which this Court held that the defendant's responses to station house questioning had to be suppressed as the fruit of an illegal arrest. Dunaway's initial

encounter with the police took place in mid-morning, petitioner's late at night; the officers who summoned Dunaway to the station never drew their guns, unlike the officers who confronted petitioner; Dunaway, unlike petitioner, was apparently never brought into the jail; and Dunaway – but not petitioner – received *Miranda* warnings. *See Dunaway*, 442 U.S. at 203, 223 (Rehnquist, J., dissenting); J.A. 42, 55, 60-64, 74, 259-60, 380-82. If Dunaway's questioning violated the Fourth Amendment, then *a fortiori* petitioner's interrogation, following "[a] midnight arrest with drawn guns" (*Dunaway*, 442 U.S. at 220 (Stevens, J., concurring)), did as well. *See also Hayes v. Florida*, 470 U.S. 811 (1985) (absent probable cause for arrest, transportation of suspect to station house for fingerprinting is illegal arrest).

III. THE POLICE-DOMINATED ENVIRONMENT IN WHICH PETITIONER WAS INTERROGATED WOULD HAVE LED A REASONABLE PERSON TO BELIEVE THAT HE WAS IN CUSTODY.

Respondent's attempt to portray this case as one involving routine "station house" questioning is disingenuous. *See, e.g.*, Resp. Br. at 14, 16, 28, 32, 33, 34. Petitioner was interrogated in the jail. *See* J.A. 73, 260, 401-03. That fact, particularly in view of the circumstances leading to petitioner's presence there, would lead a reasonable person to believe he was restrained to the degree associated with arrest.

Respondent further asserts that, because "[p]etitioner agreed to an interview in the police station," the precise location of the interrogation is not "significant." Resp. Br.

at 33-34. This is a *non sequitur*. Even assuming, *arguendo*, that petitioner consented to go to the "station house," he did not agree to be taken to the jail. To say that the location is not "significant" is to suggest that a reasonable person does not know the difference between a police station – essentially an office facility – and a jail.

Perhaps recognizing that an interrogation in a jail represents a setting in which *Miranda* warnings should be given, respondent largely ignores the site of the questioning and instead asserts that *Miranda* warnings were unnecessary because the questions asked by Sergeant Johnston were not "accusatory." Resp. Br. at 36-37. This argument fundamentally misconceives the requirements of *Miranda*. To carve out an exception to *Miranda* based on whether the questioning of the suspect is or is not "accusatory" would completely eliminate the clear, black-letter aspects of the *Miranda* holding, as well as lead to incalculable abuse. Not only would such an exception mean that application of *Miranda* would depend upon each police interrogator's style of questioning, but there would be no hope for consistency in applying the *Miranda* rule to particular cases.[9]

---

[9] In determining whether the duty to give *Miranda* warnings attaches, the lower courts have rejected the artificial distinction, which respondent urges this Court to draw here, between "accusatory" and "non-accusatory" questioning. *E.g., People v. Ellingsen*, 258 Cal.App.2d 535, 541, 65 Cal.Rptr. 744, 748 (1968) ("Nowhere in the [*Miranda*] opinion does the court distinguish the accusatory phase of an *in-custody* interrogation from the investigatory phase") (emphasis in original); *see also People v. Turner*, 37 Cal.3d 302, 318, 690 P.2d 664, 678, 208 Cal.Rptr. 196, 205 (1984) ("no fine distinction can be made as to the officer's intention when a suspect is subjected to *express questioning*")

There is, moreover, no basis on this record for the characterization of petitioner's interview as non-accusatory. The record does not disclose the actual questions asked by Sergeant Johnston. While petitioner had been told he was a possible witness, that did not exclude the possibility that he was a suspect. *See* J.A. 56, 117, 248. As Sergeant Johnston explained, "[a]nybody that was present in Baldwin Park at the time in question was a possible witness as well as a possible suspect." J.A. 323. The interview, in fact, covered petitioner's whereabouts and movements during the entire day that Robyn Jackson disappeared, including the six- to eight-hour period *after* petitioner had left the area in which she had last been seen. J.A. 75-79, 120-22, 131-34.[10]

In short, the record shows nothing about the questioning of petitioner that would support dispensing with the requirements of *Miranda*.

(emphasis in original), *overruled on other grounds, People v. Anderson*, 43 Cal.3d 1104, 742 P.2d 1306, 240 Cal.Rptr. 585 (1987).

[10] Johnston conceded that his questioning was designed, at least in part, to determine the extent "of [petitioner's] involvement [in] the crime" (J.A. 138; *see also* J.A. 83-88, 131-32). As noted in Fred E. Inbau et al., *Criminal Interrogation and Confessions* 74-75 (3d ed. 1986),

> One favored tactic for evaluating an alibi is to ask the suspect for a detailed account of his activities before and after, as well as during the crime period. . . . Criminal investigators . . . may obtain indications of a suspect's guilt or innocence by using this technique.

CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioner's opening brief, the judgment of the Supreme Court of California should be reversed.

Dated: February 15, 1994.

ROBERT M. WESTBERG
Counsel of Record
DAVID S. WINTON
JOSEPH A. HEARST
PILLSBURY MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner